

APPEAL NO. 050431
FILED APRIL 7, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 13, 2005. The hearing officer resolved the disputed issue by deciding that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the third quarter, November 11, 2004, through February 9, 2005. The appellant (carrier) appealed, disputing the determination of entitlement to SIBs for the third quarter. The carrier contends that there are other records in evidence, which show that the claimant is able to return to work and contends that there is not a sufficient narrative report from a doctor in evidence, which specifically explains how the injury causes a total inability to work. The claimant responded, urging affirmance of the disputed determination.

DECISION

Reversed and rendered in part and reversed and remanded in part

The carrier contends the hearing officer erred in determining that the claimant had no ability to work at all during the qualifying period for the third quarter and that he is entitled to SIBs for that quarter. The parties stipulated that on _____, the claimant sustained a compensable injury; that the claimant reached maximum medical improvement with an impairment rating of 15% or greater; that the claimant did not elect to commute any portion of impairment income benefits; and that the qualifying period for the third quarter began July 30, 2004, and ended October 28, 2004.

The claimant testified that he attended six hours of college courses during the qualifying period but he was not able to complete the courses. He testified that it was painful for him to sit in the classroom and that he had trouble walking across campus to his classes. The claimant testified that the job contacts listed on his Application for [SIBs] (TWCC-52) came from an internet search using a specific job search site. He testified that he thought he had a reasonable chance of performing the jobs he applied for.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). The hearing officer's finding that the claimant's unemployment during the third quarter qualifying period was a direct result of the impairment resulting from the compensable injury was not disputed on appeal. At the CCH, the claimant contended he met the good faith effort to obtain employment commensurate with his ability to work based on Rule 130.102(d)(2) and Rule 130.102(d)(5).

Rule 130.102(d)(2) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has been enrolled in, and satisfactorily participated in, a full-time vocational

rehabilitation program sponsored by the (TRC) (now part of the Company) during the qualifying period. The hearing officer did not make specific findings regarding the claimant's contention that he satisfied the good faith effort requirement through his "satisfactory cooperation" with the TRC. However, there was no documentation in evidence of enrollment of the claimant in a full-time rehabilitation program sponsored by the TRC during the qualifying period nor was there evidence of an Individualized Plan for Employment which included the qualifying period. Further, a representative from TRC testified at the CCH that the claimant was not a full-time participant in a TRC program during the qualifying period for the third quarter.

Although the claimant did not contend at the CCH that he had a total inability to work, the hearing officer found that the claimant had a total inability to work during the third quarter qualifying period and that because the claimant had a total inability to work during the third quarter qualifying period, the good faith criteria for SIBs is satisfied. Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work. In the Background Information portion of the decision, the hearing officer states that the medical evidence includes a narrative report from the claimant's treating doctor that specifically explains how the impairment from the compensable injury rendered the claimant unable to perform work in any capacity. However, she did not make any specific finding regarding a narrative. There is a narrative in evidence with an attached Work Status Report (TWCC-73) which states the claimant is permanently disabled. The narrative describes some of the claimant's symptoms and the doctor opines that the claimant will not be physically capable of returning to gainful employment but does not necessarily explain how the compensable injury causes a total inability to work. A record from a required medical examination (RME) doctor was in evidence in which the doctor opined that based on his examination of the claimant, in terms of the injuries sustained from the compensable injury, the claimant could perform sedentary duties. The hearing officer did not make a finding regarding other records, which show that the injured employee is able to return to work nor does she provide any discussion of such record in her Background Information.

In cases where a total inability to work is asserted and there are other records which on their face appear to show an ability to work, the hearing officer is not at liberty to simply reject the records as not credible without explanation or support in the record. Texas Workers' Compensation Commission Appeal No. 020041-s, decided February 28, 2002. However, "[t]he mere existence of a medical report stating the claimant had an ability to work alone does not mandate that a hearing officer find that other records showed an ability to work. The hearing officer still may look at the evidence and determine that it failed to show this." In the instant case there is no indication that the hearing officer considered the record from the RME doctor. Further, the claimant indicated that he thought he had an ability to work, testifying that he thought he had a reasonable chance of performing the work required for the jobs he searched for during

the qualifying period. Additionally, for a portion of the qualifying period, the claimant attended college courses, requiring travel to and attendance in the classroom. For the reasons set forth above, the hearing officer's determination that the claimant had a total inability to work is against the great weight and preponderance of the evidence. Accordingly, the hearing officer's determinations that the claimant had a total inability to work during the third quarter qualifying period, and that because the claimant had a total inability to work during the third quarter qualifying period the good faith criteria for SIBs is satisfied are reversed and a new determination rendered that the claimant did not satisfy the requirements of Rule 130.102(d)(4).

Rule 130.102(d)(5) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has provided sufficient documentation as described in subsection (e) of Rule 130.102 to show that he or she has made a good faith effort to obtain employment. Rule 130.102(e) provides that, except as provided in subsection (d)(1), (2), (3), and (4) of Rule 130.102, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts. That subsection then lists information to be considered in determining whether a good faith effort has been made. In the instant case, the hearing officer found that the claimant looked for work each week of the third quarter qualifying period despite his off-work status. However, she did not make any findings regarding whether the claimant's job search satisfied the good faith effort requirements according to Rule 130.102(d)(5). We remand this case back to the hearing officer to make additional findings regarding Rule 130.102(d)(5).

We reverse the hearing officer's findings that the claimant had a total inability to work during the third quarter and that because of that total inability, the good faith criteria for SIBs is satisfied and render a new determination that the claimant did have an ability to work during the third quarter qualifying period. We remand this case back to the hearing officer to make additional findings regarding Rule 130.102(d)(5).

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202, which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods.

The true corporate name of the insurance carrier is **ROYAL INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
701 BRAZOS STREET, SUITE 1050
AUSTIN, TEXAS 78701.**

Margaret L. Turner
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Veronica L. Ruberto
Appeals Judge